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NOTES

FUNDING OF PRIVATE RELIGIOUS SCHOOLS: ADLER V. ONTARIO

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The lengthy legal battle over public funding of private religious schools has come to an end with the recent Supreme Court of Canada decision in *Adler v. Ontario*.[1] The Court's ruling that the province has no obligation to fund these schools has not put an end to the debate, however. Parents and supporters have vowed to move the fight to redress this "historical grievance" into the political arena.[2]

The case sets the historical and constitutional context for this continuing debate on private schools. It also illustrates the constitutional justifications for funding some religious schools in the province but not others and clarifies the parameters of the provincial power to legislate on the issue.

THE FACTS

The case was launched in 1992 by a group of Jewish and Christian parents who, because of their religious and conscientious beliefs, sent their children to private religious schools. The cost of the schooling had to be borne by the parents because the province did not fund these schools as it did the public and Roman Catholic separate systems. The parents argued that this failure to fund their schools violated their freedom of religion and equality rights guaranteed under the *Charter of Rights and Freedoms*.

These claims were rejected by two lower courts.

THE ISSUES

There were essentially two issues before the Supreme Court:

"1. Whether the current education funding in Ontario violates the appellants' religious and equality rights as guaranteed by ss. 2(a) and 15 of the *Charter of Rights and Freedoms*?

2. Whether the provision of school health support services (SHSS) only to students in the public and separate schools violates the appellants' ss. 2(a) and 15 *Charter* rights?"

THE DECISION

In a 7–2 decision, the Supreme Court rejected the parents' claims and found that the province was under no obligation to fund either the independent religious schools or SHSS in these schools. The Court concluded that failure to fund religious private schools did not violate the parents' freedom of religion or equality rights under the *Charter*.

The key to the Court's decision lies in s. 93 of the *Constitution Act, 1867*. This section gives the province the exclusive power to legislate in relation to education subject only to certain conditions. One of these conditions is that no law may prejudicially affect any rights or privileges with respect to denominational schools that existed at the time of Confederation (i.e., Roman

[1] *Adler v. Ontario*, (1996), 30 O.R. (3d) 642 (S.C.C.)
[2] Shawn McCarthy, "Private religious schools lose funding court case," *Toronto Star*, 22 November 1996, p. A1.

Catholic in Ontario and Protestant in Quebec). According to the court, this provision, which was a "fundamental part of the Confederation compromise," has constitutionally entrenched a special status for the pre-Confederation denominational schools, granting them rights which are denied to others. It is s. 93 that obliges the province to fully fund Roman Catholic separate schools in Ontario.[3]

In the view of the majority, any claim for denominational school rights begins and ends with s. 93; it is a "comprehensive code." In order to claim the benefit of s. 93, it must be shown that there was a right or privilege with respect to denominational schooling which was enjoyed by law at the time of union. No such right or privilege existed by law in pre-Confederation Ontario for denominations other than Roman Catholics.

Denominational school rights cannot be enlarged through the operation of other sections of the Constitution, notably in this case, ss. 2(a) and 15(1) of the *Charter* (freedom of religion and equality rights). To decide otherwise, would be to hold one section of the Constitution in violation of another.

For the same reason, the Court rejected the argument that the decision to fund Roman Catholic schools but not other religious schools contravenes equality rights. Moreover, s. 29 of the *Charter* explicitly exempts from *Charter* challenge all rights and privileges "guaranteed" under the Constitution in respect of denominational schools.

Again for the same reason, the failure to fund private religious schools while funding public schools was held not to violate the equality provisions of the *Charter*. In the majority's view, public schools are part of the s. 93 scheme as it applies to Ontario, and consequently, receive a similar protection against constitutional or *Charter* attack. This protection exists despite the fact that public school rights are not themselves constitutionally entrenched. The province's plenary power to legislate with regard to public schools (which are open to all members of society without distinction) is constitutionally entrenched in s. 93.

The majority also held that the decision not to fund SHSS in private religious schools is immune from *Charter* scrutiny. These support services are designed to ensure that children with special needs have full access to the public school system. The program is therefore simply in keeping with the government's fulfillment of its mandate to provide an education designed for all members of the community. Thus, the failure to extend these services to private religious schools does not violate either s. 2(a) or 15(1) of the *Charter*.

The Court made two final points. First, the province's plenary power over education is not limited to the public and separate school systems. The province may establish and fund such other religious schools as it chooses. Second, the protection from *Charter* scrutiny in respect of s. 93 applies only with respect to the existence of Roman Catholic and public schools in Ontario. Whenever the government decides to go beyond the confines of this special mandate, the *Charter* could be successfully invoked to strike down the legislation in question. In other words, provincial legislation in respect of public and separate schools is subject to *Charter* scrutiny if it deals with matters beyond those essential to the existence of such schools.

CONSTITUTIONAL AMENDMENT

The legislative constraints imposed by s. 93 have led two provinces to pursue a constitutional amendment. As a first step to undertaking broad educational reforms, both Newfoundland and Quebec are seeking to eliminate the denominational rights guaranteed under s. 93.

[3] *Reference Re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148.

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